IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-849

WOODMAR REALTY COMPANY, AN INDIANA CORPORATION, AND OWEN W. CRUMPACKER,
Petitioners,

vs.

SAMUEL C. ENNIS & COMPANY, INC., SAMUEL C. ENNIS, MERCANTILE NATIONAL BANK OF INDIANA AS EXECUTOR UNDER THE LAST WILL AND TESTAMENT OF DONALD C. GARDNER, DECEASED, JOHN G. PHROMMER, HERSCHEL B. DAVIS, BEATRICE LEVIN, EXECUTRIX UNDER THE LAST WILL AND TESTAMENT OF CHARLES LEVIN, DECEASED, FLOYD R. MURRAY, EDMOND J. LEENEY AND WALTER A. McCLEAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OWEN W. CRUMPACKER, ESQ.,
Room 300, Hammond Building,
5217 Hohman Avenue,
Hammond, Indiana 46320,
Attorney for Petitioners.

THOMAS T. CRUMPACKER,
Room 300, Hammond Building,
5217 Hohman Avenue,
Hammond, Indiana 46320,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Woodmar Realty Company, an Indiana Corporation and Owen W. Crumpacker, pray that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on September 21, 1976.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported in West's advance sheets, 541 F. 2d 45, and is re-

"(1) where the petition was filed under section 527 of this title, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this title; or

"(2) where the petition was filed under section 528 of this title, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders."

U. S. C. A., Title 11, Ch. 10, § 637 provides:

"§ 637. Dismissal of original petition; discharge of trustee and closing of estate.

"Upon the dismissal of a proceeding under this chapter, where the petition was filed under section 528 of this title, the Judge shall enter a final decree discharging the trustee, if any, and closing the estate, except as otherwise provided by section 659 of this title."

U. S. C. A., Title 11, Ch. 10, § 659 provides:

"§ 659. Reinstatement of prior proceeding on dismissal of reorganization; reorganization allowances and obligations.

"Upon a dismissal of a proceeding under this chapter, such prior proceeding shall become reinstated, and the judge shall allow the reasonable costs and expenses under this chapter, including the allowances provided for in subchapter XIII of this chapter, and shall make appropriate provision of there transfer of such property to the person or persons entitled thereto upon such terms as may be equitable for the protection of the obligations incurred in the proceedings under this chapter by the trustee or debtor in possession, and for the payment of the costs and expenses of the proceedings. July 1, 1898, c. 541, § 259, as added June 22, 1938, c. 575, § 1, 52 Stat. 902."

STATEMENT OF THE CASE.

Petitioner, Woodmar Realty Company, an Indiana corporation, was incorporated on October 1, 1923. Of an authorized capital stock of 5,000 shares at a par value of $100 per share, 2,406 are outstanding. It's board of directors consist of Helen M. Woods, President, J. Carter Miller, Jr., Vice-President, Wm. P. Wilke, IV, Christine M. Jacewicz, Secretary-Treasurer. (A14.) On January 13, 1971, it was the owner in fee simple of a square mile of improved real estate in the City of Hammond, Lake County, Indiana. The improved real estate consisted of business and residential lots, nine (9) unsubdivided blocks, and real estate in two adjacent subdivisions. The Woodmar Realty Company had dedicated and paved streets and sidewalks, and installed water mains, gas mains, sewers, ornamental lights, etc.

Four holders and owners of defaulted City of Hammond Special improvement bonds, representative of lien rights against certain Woodmar lots, invoked the jurisdiction of the Federal Court on January 13, 1941 by filing a creditors petition under Chapter X of the Bankruptcy Act (Chandler Act). On January 18, 1941, the Woodmar Realty Company, as the debtor in reorganization, filed answer consenting to reorganization. A reorganization trustee, Charles L. Suprise, was appointed on January 24, 1941. Woodmar's real estate had a book value of $2,341,970.00 on March 20, 1941. It's debts were negligible. The company could not meet it's debts as they matured due to the nation-wide depression of the 1930's. The stockholders consented to an amended plan of reorganization which was confirmed by order of court entered on November 22, 1941. Under the amended plan of reorganization, delinquent, general real estate taxes were compromised and paid pursuant to the terms of the Indiana tax moratorium law. The stockholders, who also held first mortgage bonds, compromised and released their lien rights for a conveyance of real estate appraised at $37,225.00. The reorganization plan provided for the issuance of stock in

the reorganized company. The new stock was to be issued with preference given to the holders of defaulted City of Hammond improvement bonds representative of lien rights on the real estate. The so-called lien claimants were required to file claims asserting their lien rights. By the terms of the confirmation order, the trustee and his attorney were to file objections to the so-called lien claims, attend hearings before the referee with the view and purpose of determining the nature and extent of the lien rights, and, as a consequence, the nature and extent of the preferred stock which was to be issued. (A20 and A21.)

Neither the trustee nor the members of the bondholders protective committee took any steps to consummate the amended plan of reorganization according to it's terms. Instead, and having acquired legal title to the Woodmar Realty Company's real estate by operation of law, the court appointed fiduciaries proceeded to canvass the owners of defaulted special improvement bonds as disclosed by the City of Hammond's bond register for the purpose of procuring lien claims. Many of the defaulted and outlawed bonds were picked up by the court appointed fiduciaries for as little as three cents on the dollar. Having acquired undisclosed interests in many of the defaulted improvement bonds through a collection agency, Lake Assessment Bond Service, the trustee, trustee's attorney, and a trustee's auditor and accountant, Clifford A. Etling, took no steps to contest the lien claims in accordance with the prior court order. Instead, the trustee, with the aid and assistance of the bondholders committee, sold all of the real estate at nominal prices. A substantial amount of the real estate was acquired by the court appointed fiduciaries. By December of 1950, the trustee had sold all of the real estate without regard to any purported lien rights, commingling the net cash received. On April 16, 1951, trustee Charles L. Suprise had net cash assets on hand of $481,000.00. (A20-A23.)

The court appointed fiduciaries filed claims for fees totaling $287,000.00. Trustee Suprise, with the knowledge and consent

of the court appointed fiduciaries, proposed an amendment to the amended plan of reorganization, which had been confirmed nine years before. The proposal was denominated an alternative plan of distribution. The net cash assets after the payment of fees and costs were to be paid to the Lake County Treasurer, acting *ex officio* as the City Treasurer, who would then distribute the funds pursuant to the formula, or auditing study, devised by the brother of the trustee's attorney, Arnold G. Huebner, who acted in the duel capacity of Assistant Secretary Treasurer of Lake Assessment Bond Service, Inc. as well as trustee's attorney.

The Woodmar Realty Company and its stockholders, by and through it's attorney, filed written objections to the fiduciaries' fee claims and the alternative plan of distribution. Following prolonged hearings covering a period of time from April 16, 1951, through January of 1952, the District Judge, on October 29, 1952, entered findings embodied in a written opinion sustaining the Woodmar Realty Company's objections. The fee claims and alternative plan of distribution were denied by an order entered on December 3, 1952. The trustee, Charles L. Suprise, was removed and required to pay back interim fees. The bondholders committee was dissolved and its attorneys discharged. A new trustee, respondent Walter A. McLean, was appointed to succeed Surprise. Respondent Herschel B. David, who had been acting as co-attorney with Arnold G. Huebner for trustee Surprise since May of 1950, was appointed as attorney for trustee McLean.

With the consent of the District Judge, the Woodmar Realty Company was authorized to defend the assets against hostile lien claims through the filing of separate objections to the same. With knowledge of the existence of the objections, trustee McLean with the aid and assistance of respondent Herschel B. Davis and some of the former members of the bond holders committee and their attorneys, undertook to resurrect the alternative plan of distribution rejected by the District Court in it's order of December 3, 1952.

The same mathematical formula devised by Arnold G. Huebner was incorporated into an "auditing study" prepared by an auditor by the name of McCall. Based upon the McCall auditing study, and on September 7, 1955, respondent Walter A. McLean filed what was designated as the "Trustee's Final Report; Petition for the Determination of Amounts due on Special Assessment Bonds and Coupons Constituting Secured Claims." The report undertakes to describe how the trustee and the auditor had undertaken to divide up the Woodmar Realty Company's cash assets in the amount of $481,008.11. A general fund of $36,876.53 was created. $382,989.63 was to be divided up among a list of claimants set forth on exhibit "A", $17,705.45 was to be deposited in the Clerk's Office for the benefit of 43 alleged claimants who did not have any special improvement bonds to support their claims, and an additional $43,436.47 was to be deposited in the Clerk's Office for the benefit of unknown people who had never filed claims.

The Court of Appeals is in error in stating that the case was then "converted to a straight bankruptcy." (A4.) By their conduct, the court appointed fiduciaries had made reorganization impossible. No useful purpose would be served by issuing new stock in a reorganized company because the corporate assets in the custody of the court appointed trustee amounted to $481,000.00 in cash. The Woodmar Realty Company urged, successfully, that the District Court proceed to retain jurisdiction under U. S. C. A., Title 11, Ch. 10, § 637 and 659 to enable the Woodmar Realty Company to obtain an adjudication of the rights, if any, of the lien claimants in the cash assets. Either the court appointed trustee or, in the alternative, the debtor in possession, could pay the amounts found due and terminate the proceedings. Trustee McLean, trustee's attorney Herschel B. Davis, Edmond J. Leeney, Charles Levin, and others induced the District Court to reverse it's determination of February 16, 1953 and make a further effort to distribute the cash assets among the secret holders of outlawed City of Hammond improvement bonds. The rulings of March 5 and 20, 1956 in favor of the trustee were reversed by the Court of Appeals in February of 1957. (A25 and 26, 241 F. 2d 768.) The law of the case was re-confirmed on November 20, 1960 when the Court of Appeals reversed the District Court a second time on the subject of the settlement of lien claims (A27 and A28, 284 F. 2d 815.)

Through the first two appeals, it was judicially determined that "the pending litigation was in reality between Woodmar and the lien holders. Whether it was litigated to a finish or settled, they were the ones who would ultimately be affected thereby. Such *litigation was really an ordinary civil controversy.*" (A28, 284 F. 2d 815.)

Through no fault on the part of the Woodmar Realty Company, or its counsel, the fifth (5th) District Judge, assigned to the case on December 27, 1957, refused to follow the law of the case established by the Court of Appeals and the procedures adopted by the late Judge W. Lynn Parkinson following remand. The Woodmar Realty Company was treated as an adversary of the trustee, respondent McLean, and the trustee's attorney, Herschel B. Davis. They worked, hand in hand, with certain of the attorneys for the major lien claimants to accomplish the distribution of the cash assets to either unknown or undisclosed holders of defaulted City of Hammond Special improvement bonds.

The Woodmar Realty Company, through no fault of its own, was compelled to struggle to protect the estate. It neither sought nor obtained a discharge in bankruptcy. With court approval, it maintained its separate existence and, following the order of December 3, 1952, ceased to be represented by trustee McLean. Over the objection of the Woodmar Realty Company, a substantial portion of its cash assets was paid out to hostile lien claimants who were not creditors of the Woodmar Realty Company. Woodmar's actual creditors, though few in number, were ignored. (A28-A30.)

To avoid the running of the five year statute of limitations, the Woodmar Realty Company, on May 4, 1974, filed an action in the Lake Superior Court, Room No. One, under Cause No. 174-439 seeking damages against the respondents for malicious abuse of process, a well recognized tort. It filed written demand for a trial by jury. Respondents appeared generally in the Lake Superior Court, Room One, and invoked the jurisdiction of that court on the grounds, among others, that the complaint of the Woodmar Realty Company failed to state a claim upon which relief could be granted. This occurred over a year prior to the filing of the federal court action (August 20, 1975).

RESPONDENTS HAVE FAILED TO PLEAD OR PROVE A FEDERAL COURT JUDGMENT.

The opinion of the Court of Appeals is in error on a vital particular, to-wit: the nature and extent of the so-called judgment referred to in one of the seven (7) appeals in the Woodmar Realty Company reorganization. *In Re Woodmar Realty Company*, 294 F. 2d 785. The complaint for an injunction filed by the respondents in the United States District Court on August 20, 1975 does not refer to the purported adjudication relied upon by the Court of Appeals. (See Appendix, pp. A12 to A14.) The Court of Appeals, by going outside of the record for the facts, has reached an erroneous and prejudicial conclusion:

The opinion reported in 294 F. 2d 785 refers to an appeal from an order entered on October 1, 1960 dismissing the Woodmar Realty Company's Amended Petition to Remove Trustee Walter A. McLean and Trustee's Attorney Herschel B. Davis, and to Restore the Woodmar Realty Company to Possession of Its Assets (filed on January 13, 1959).

The amended petition was dismissed without a hearing on the merits on October 21, 1960. ("For the above and foregoing reasons, the amended petition and the petition are dismissed.")

The record in Court of Appeals No. 13215 (Appellant's Appendix) discloses that the district judge, Hon. Robert E. Tehan, at a conference in Milwaukee on April 24, 1958, forced the Woodmar Realty Company to file a Petition to Remove the Trustee and Trustee's Attorney. Petitioner Owen W. Crumpacker advised Judge Tehan that it was the desire of the Woodmar Realty Company "to proceed to try these claims without collateral issues, you see." At the insistence of Judge Tehan, Woodmar, on May 19, 1958, filed a Petition to Remove Trustee and Trustee's Counsel and Restore Debtor to Possession. On June 17, 1958, the Trustee and Trustee's counsel filed answer on the merits, setting up three (3) defenses. Judge Tehan set the Petition to Remove, etc. for hearing on July 30, 1958. The Woodmar Realty Company was ready to proceed. Witnesses were under subpoena. Documents had been served and filed in connection with requests for admissions. Over Woodmar's objection, Judge Tehan postponed the hearing and ordered Woodmar to file an amended petition because the allegations were not sufficiently specific under Rule 9(B). Pursuant to Judge Tehan's direction, Woodmar filed a lengthy Amended Petition to Remove Trustee, etc. supported by a lengthy "List of Exhibits." It was filed on January 13, 1959. Respondents Walter A. McLean and Herschel B. Davis, on February 7, 1959, moved to dismiss on the following grounds:

> "To dismiss the Amended Petition to remove Trustee Walter A. McLean and Trustee's attorney, Herschel B. Davis, because said petition fails to state facts against said respondent, warranting their removal." (Appendix, No. 13215, p. 186.)

The Motion to Dismiss was briefed and argued in Milwaukee on May 21, 1959. In avoidance of an alternative writ of mandate procured by the Woodmar Realty Company, Judge Tehan ordered, on January 16, 1960, that the parties re-argue the motion of Trustee and Trustee's counsel to dismiss the Amended Petition to Remove the Trustee and Trustee's Attorney and to Restore the Woodmar Realty Company to Possession of Its

Assets. Woodmar objected to "re-argument," filing extensive and detailed written objections. (Appendix, No. 13215, pp. 188-246.)

In avoidance of Woodmar's further application for a writ of mandate, Judge Tehan, on October 21, 1960, over two and a half years after he had compelled Woodmar to file a Petition to Remove the Trustee, etc., entered an order and judgment reading in pertinent part as follows:

> ". . . (1) the amended petition fails to state facts warranting the removal of the trustees and his attorney, (2) The amended petition fails to comply with the provisions of Rules 8 and 9 of the Federal Rules of Civil Procedure, (3) The matters raised in the amended petition are res adjudicata, and finally, (4) The amended petition was not filed in good faith.
>
> "Now therefore, It is Ordered: That the amended petition to remove trustee, Walter A. McLean and Trustee's attorney, Herschel B. Davis, and to restore the Woodmar Realty Company to possession of its assets, filed on or about January 7, 1959, be and the same is hereby dismissed.
>
> "Dated, this 21st day of October, 1960.
>
> /s/ ROBERT E. TEHAN,
> *U. S. District Judge.*"

Inasmuch as the removal of court appointed fiduciaries in a corporate reorganization is largely a matter of discretion on the part of the presiding judge, the dismissal of the amended removal petition without a hearing is and was an incidental interlocutory ruling that adjudicated nothing.

THE DOCTRINE OF LOCAL LOAN COMPANY vs. HUNT (1934, 292 U. S. 234, 54 S. Ct. 695, 78 L. ED. 1230, 93 ALR 195) DOES NOT JUSTIFY THE GRANTING OF AN INJUNCTION.

It will be observed that the opinion of the Court of Appeals undertakes to rely on the exception implied in § 2283 with reference to bankruptcy jurisdiction. (See also Moore's Federal Practice, Vol. 1A, Part 2, P. 2406, (2) Doctrine of *Local Loan Company* v. *Hunt.*) In *Local Loan Company,* Hunt sought and obtained a discharge. In the instant case, the Woodmar Realty Company was not adjudicated a bankrupt in the insolvency sense and neither sought nor received a discharge in bankruptcy. The respondents in their complaint filed in the District Court rely on the order of May 16, 1969 approving the Trustee's final account and discharging and relieving the trustee of his trust. The Woodmar Realty Company and the City of Hammond, pursuant to notice, filed objections to the Trustees final account and claims for fees. Judge Tehan, again, denied the objections without permitting either the Woodmar Realty Company or the City of Hammond to put on proof in support of the objections.

The disbursement of funds, the matter of accounting, is shown by the cancelled checks drawn on the Trustee's account in the Gary National Bank and counter-signed by Judge Tehan. A substantial number of checks were endorsed not by the payees but by respondents Floyd R. Murray and Edmond J. Leeney. They were deposited in a "special" or "escrow" account in the Mercantile National Bank. The ultimate distributees are not disclosed. The Woodmar Realty Company's damage suit, however, is predicated upon the willful and malicious abuse of process, to wit: the misuse of the Chandler Act procedures. It is self-evident, we believe, that federal court reorganization powers and procedures are subject to being abused and misused like all other processes.

REASONS FOR GRANTING THE WRIT.

This case involves a marked departure from two important precedents of this Court on the subject of comity between the jurisdiction of federal and state Courts:

> *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.* (1955), 348 U. S. 511, 516, 75 S. Ct. 452, 99 L. Ed. 600.
>
> *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers* (1970), 398 U. S. 284, 90 S. Ct. 1739.

The Court of Appeals for the Seventh Circuit, in the present opinion by Hon. Philip W. Tone and an earlier opinion relied on by him, *Doe* v. *Ceci* (7th Cir. 1975), 517 F. 2d 1203, 1207, has demonstrated that, on the theory of avoidance of re-litigation, the litigants in state courts are subject to being enjoined notwithstanding the express prohibition of Congress in 28 U. S. C. A. § 2283, *supra.* The mere existence of a corporate reorganization is reason enough for enjoining the prosecution of an action in personam, sounding in tort, being an action at law triable by jury. (The opinion of the Seventh Circuit is in error in stating that the Woodmar Realty Company instituted the litigation "more than five years after the termination of the proceedings" on May 16, 1959) Woodmar received no benefits from the 28½ year old reorganization. It was stripped of 1540½ valuable business and residential lots plus 9 unsubdivided blocks and improved real estate in adjacent subdivisions. *Not a single one of it's creditors was paid during the 28½ years that it's property was held by hostile, interested trustees.* A rival real estate firm, S. C. Ennis & Company, prospered at Woodmar's expense. The Woodmar Realty Company's stockholders compromised and paid the mortgage indebtedness under the reorganization plan—later abandoned by the fiduciaries. The fee simple landowners, alone, were the beneficiaries of the Indiana tax moratorium law. The so-called *"Mercer"* opinion of June 23, 1961, *294 F. 2d at 789,* makes the attorney for the Woodmar Realty Company the culprit for Federal custody of valuable assets over a period of 28½ years. Using the dissenting opinion in *Toucey* v. *New York Life Insurance Co.* (1941), 314 U. S. 118, 62 S. Ct. 139, 86 L. Ed. 100, 137 ALR 967 and the interpretation placed upon it by a textwriter, Moore's Federal Practice, 1A, Part 2 § D.208.(2), as a springboard, the Seventh Circuit has made it clear that the statutory restraint on federal court interference by injunction with state court proceeding in an archaic relic like the dinosaur. The tragic aspect of the ruling in the present case is that it places a premium on the misconduct of court-appointed fiduciaries and their colleagues.

This Court in *Toucey, supra,* stated: "Loose language and a sporadic, ill-considered decisions cannot be held to have imbedded in our law a doctrice which so patently violates the expressed prohibition of Congress." 314 U. S. 118, 62 S. Ct. 139. In *American Clothing Workers of America* and *Atlantic Coast Line R. Co., supra,* this Court made it clear that Congress, by the 1948 amendment, did not intend to open the door to federal courts' use of injunctive power to save the defendants the time and trouble of pleading *res judicata* in state court actions. (See District Court's Order, A34) "By that enactment, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisations." "The prohibition of § 2283 is but continuing evidence of confidence in state courts, reinforced by a desire to avoid direct conflicts between state and federal courts." 328 U. S. 514-516, 518.

The Seventh Circuit opinion misconceives the October 29, 1952 findings and the December 3, 1952 order entered *in favor of the Woodmar Realty Company and its stockholders* (Opinion, A4) The Court relies on the *Mercer* opinion—not the facts in the record. The findings and decree were before the Court of Appeals in the first appeal *which Woodmar won. In the Matter of the Woodmar Realty Company* (1957), 241 F. 2d 768. (See Appellant's Appendix, and Supplemental Appendix in Court of Appeals No. 11783). An appeal will not be entertained by the prevailing party merely because the judge's decision does not include all pertinent findings tendered. The opinion is in error further in stating when the suit was filed and the amount of the ad dannum. (A5). The present suit was filed in the state court on May 4, 1974 seeking $2,500,000 in damages.

The opinion of the Seventh Circuit erroneously usurps the function of the state court by undertaking to create a plea of *res judicata* for the benefit of the state court defendants. (Opinion, par. 2, A5) The petitioners' state court complaint is part of the record on this appeal. Except for rhetorical paragraphs

17 thru 39, eliminated to reduce unnecessary printing costs, the complaint is reproduced at pages A15 thru A31 of this Appendix, *infra.* The Amended Petition to Remove the Trustee and Trustee's Attorney was not part of the present record in the Court of Appeals but can be supplied.

The "ancillary jurisdiction doctrine" of *Local Loan* v. *Hunt* is erroneously applied. Here the reorganization plan was abandoned. The district court on February 16, 1953 entered an order under 11 U. S. C. A. Ch. 10, Sub Chapter XII, § 636, *supra,* and 11 U. S. C. A. § 659, *supra.* The final decree entered pursuant to 11 U. S. C. A., Ch. 10, § 637 is set forth at page A14 of the Appendix, *infra.* That trustee McLean filed his account pursuant to a court order is not disputed. Petitioner Owen W. Crumpacker, despite public and unwarranted castigation, is not suing on behalf of his client to vacate the distribution order. In truth and in fact Woodmar is seeking the $49,000 surplus held by the Administrator of Courts. Under the law of the case as expressed in the opinion of November 23, 1960 (Appendix A28 and A29, *infra,* 284 F. 2d 815): "The balance of this depleted fund would become the property of Woodmar." In most actions for damages for malicious abuse of process the pleadings and orders appear regular upon their face.

There is no basis in law or fact for protecting respondents Samuel C. Ennis & Company, Inc., Samuel C. Ennis, Mercantile National Bank, executor of the Estate of Donald C. Gardner, John G. Phrommer, Beatrice Levin, Executrix of the Estate of Charles Levin, Floyd R. Murray, Edmond J. Leeney, Herschel B. Davis, and Walter A. McLean from engaging in a plan and scheme to deprive the Woodmar Realty Company and legitimate lien claimants of their rights in the real estate, appraised at $2,341,970 on March 24, 1941 (complaint, rh. par. (4), A17), for 28½ years. The District Court didn't seize the property and hold it for three decades in a vacuum. Woodmar was compelled to wait, as a matter of law, for the potential jurisdiction over its affairs to terminate before filing suit. The reorganization trustee would have stripped Woodmar and it's attorney of all of their papers, files and bank accounts if a suit was filed prior to May 16, 1959. The law of collateral estoppel is not one of the listed exceptions "as expressly authorized by Act of Congress." To suggest that Woodmar could" litigate those issues in the bankruptcy proceedings" is absured. (A8)

That a 28½ year reorganization can't exist "without attorneys to appear on behalf of the parties, buyers to purchase the assets of the estate or agents to handle the sales" as stated by the Seventh Circuit is not reason or excuse for invading the jurisdiction of the state court to prevent full recovery of damages from the respondents. (Opinion, A9). The award of a substantial, damage judgment will do more to halt abuses by *corrupt juduciaries handling other peoples affairs* under the auspices of the Chandler Act than the enforcement of the criminal laws adopted by Congress to protect the debtor in reorganization. (The complaint shows upon it's fact that the criminal laws were not enforced.)

CONCLUSION.

By reason of the foregoing, petitioners respectfully submit that the petition for a writ of certiorari should be granted and that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

OWEN W. CRUMPACKER, ESQ.,
Room 300, Hammond Building,
5217 Hohman Avenue,
Hammond, Indiana 46320,
Attorney for Petitioners.

THOMAS T. CRUMPACKER,
Room 300, Hammond Building,
5217 Hohman Avenue,
Hammond, Indiana 46320,
Of Counsel.

APPENDIX.

OPINION BY JUDGE TONE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 21, 1976

Before
HON. THOMAS E. FAIRCHILD, *Chief Judge.*
HON. WALTER J. CUMMINGS, *Circuit Judge.*
HON. PHILIP W. TONE, *Circuit Judge.*

SAMUEL C. ENNIS & COMPANY, INC., et al., *Plaintiffs-Appellants,* vs. WOODMAR REALTY COMPANY, an Indiana corporation, and OWEN W. CRUMPACKER, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. H 75-C-179 Allen Sharp, Judge

No. 75-2104

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed and Remanded, with costs, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 75-2104

SAMUEL C. ENNIS & COMPANY, INC., SAMUEL C. ENNIS, DONALD C. GARDNER, JOHN G. PHROMMER, HERSCHEL B. DAVIS, CHARLES LEVIN, FLOYD R. MURRAY, EDMOND J. LEENEY and WALTER A. MCLEAN,

Plaintiffs-Appellants,

vs.

WOODMAR REALTY CORPORATION, an Indiana corporation, and OWEN W. CRUMPACKER,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana
Hammond Division — No. H 75 C 179
ALLEN SHARP, *Judge.*

ARGUED APRIL 29, 1976—DECIDED SEPTEMBER 21, 1976

Before FAIRCHILD, *Chief Judge,* CUMMINGS and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* We must decide in this case whether, in light of 28 U. S. C. § 2283 and its relitigation exception, a federal court before which a bankruptcy proceeding was conducted may protect parties and attorneys in that proceeding and persons doing business with the trustee from relitigation in a state court of issues determined in that proceeding. The District Court answered in the negative because of the statute. We reverse.

The bankruptcy proceeding from which the case before us arises was commenced January 13, 1941, and terminated over 28 years later, on May 16, 1969. During the entire proceeding, which included eight appeals taken to this court,[1] the bankrupt, Woodmar Realty Company, an appellee here, was represented by Attorney Owen W. Crumpacker, the other appellee here. More than five years after the termination of the proceeding, Woodmar, represented by the same attorney, filed a damage suit in an Indiana state court charging the trustee in bankruptcy and various other participants in the bankruptcy proceeding with perpetrating a fraud on the bankruptcy court. The defendants in that action, after first moving to dismiss it, filed this federal action against appellees seeking to enjoin the state action. The District Court dismissed this action on the ground that 28 U. S. C. § 2283 forbids the relief sought.

Woodmar Realty was involved in the development and sale of real estate. When certain municipal bonds which had been used to finance improvements on its tracts were not paid, some of the bondholders, asserting special assessment liens against Woodmar land, filed a reorganization petition. A trustee and trustee's attorney were appointed and a bondholder's committee was formed. One member of the committee was appellant Floyd Murray, and its attorney was appellant Donald Gardner.

With court approval, the real estate was sold and the liens transferred to the proceeds. The sales were made through Samuel C. Ennis & Company, which, with Samuel C. Ennis, is among

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1. *In re Woodmar Realty Co.,* 241 F. 2d 768 (7th Cir. 1957); *In re Woodmar Realty Co.,* 284 F. 2d 815 (7th Cir. 1960); *In re Woodmar Realty Co.,* 294 F. 2d 785 (7th Cir. 1961), *cert. denied,* 369 U. S. 803 (1962); *Woodmar Realty Co.* v. *McLean,* 306 F. 2d 479 (7th Cir. 1962), *cert. denied,* 380 U. S. 952 (1965); *In re Woodmar Realty Co.,* 307 F. 2d 591 (7th Cir. 1962); *In re Woodmar Realty Co.,* 307 F. 2d 595 (7th Cir. 1962); *In re Woodmar Realty Co.,* No. 14756 (7th Cir. April 28, 1964) (unpublished order); *In re Woodmar Realty Co.,* 384 F. 2d 776 (7th Cir.), *cert. denied,* 389 U. S. 1040 (1967).

the appellants before us. Also an appellant is John Phrommer, who, together with Donald Gardner, purchased some of the parcels.

The original trustee and attorney were removed and their fee petitions denied because they were found to have an undisclosed conflict of interests. The District Court also found that certain sales of real estate by Ennis had not been made at arm's length, and that several fiduciaries had profited from speculation in the improvement bonds. The court concluded, however, that no prejudice had resulted to stockholders or creditors or the estate or its administration, and made no findings of fraud. No appeal was taken from this order, which was entered in 1952. See *In re Woodmar Realty Co.*, 294 F. 2d 785, 790 and n.2, 791-792 (7th Cir. 1961), *cert. denied*, 369 U. S. 803 (1962).

The case was then converted to a straight bankruptcy. Appellants Walter McLean and Herschel Davis were appointed as trustee and attorney for the trustee. Woodmar filed a petition to remove them, based on allegations that they were part of a conspiracy, with the original trustee and others, to procure the allowance of invalid bond claims. The District Court's denial of the petition was affirmed by this court in an opinion in which the charges against McLean and Davis were found to have been made in "gross bad faith." *In re Woodmar Realty Co., supra*, 294 F. 2d at 789. The court remarked on "a vituperous tendency of counsel to read some heinous motive into the acts of anyone who dares to oppose him and of every judge who rules adversely to him" and a "pattern which the record reveals of charging both the dead and the living with fraud whenever an adverse ruling is contemplated or becomes a reality." *Id.* at 792. On reviewing the entire record of the proceedings, the court concluded:

> "We find a sordid picture of the repeated use of ill-founded charges of fraud as a trial tactic which is foreign to established concepts of honest and ethical advocacy. We want it clearly understood that repetition of that practice as disclosed by this record will not be tolerated in the future." *Id.* at 795.

Most of the bondholders' claims were eventually allowed and, as we have noted, the estate was finally closed in 1969.

In September 1974, Woodmar, still represented by the same attorney, filed in the Indiana state court the action appellants seek to enjoin. Damages in the amount of $25,000,000 were demanded. The complaint in that action names as defendants, in addition to those appellants already mentioned, appellants Edmond Leeney and Charles Levin, who, with appellant Floyd Murray, were the attorneys representing the bondholders in the bankruptcy proceeding. Woodmar alleges in the complaint that all the persons who are appellants here conspired to procure the payment of fraudulent claims and misappropriate the assets of the estate.

All the same allegations of fraud were made many years earlier in the bankruptcy proceeding. This becomes apparent when the complaint filed in the Indiana state court is laid beside Woodmar's Amended Petition to Remove the Trustee and His Attorney filed January 13, 1959, which is set forth in the Appendix in Case No. 13215 in this court. Everything of substance in these allegations is discussed in the opinion in that case, *In re Woodmar Realty Co., supra*, 294 F. 2d at 785. In the course of the bankruptcy proceeding all these allegations were ruled upon adversely to Woodmar. The only allegations of the Indiana complaint concerning occurrences after the decision in that case, apart from damage allegations, relate to the bankruptcy court's reinstatement and allowance of additional claims, allowance of fees, and directions for allocation and distribution of the assets of the estate. It is not alleged that these orders were procured by fraud or were otherwise improper. Even if these allegations are viewed as alleging further acts pursuant to the alleged conspiracy, they are defeated not only by the adjudication which we have already described but also by later decisions of this court affirming the allowance of the "test claim" and

determining that the proceeds of the sale of estate assets were available to the bondholders. *In re Woodmar Realty Co.*, 307 F. 2d 591 (7th Cir. 1962), and approving the trustee's final account, including trustees' and attorneys' fees, *In re Woodmar Realty Co.*, 384 F. 2d 776 (7th Cir.), *cert. denied*, 389 U. S. 1040 (1967).

1.

Appellees argue that federal jurisdiction is lacking because plaintiffs and defendants are citizens of the same state. Jurisdiction exists, however, under the ancillary jurisdiction doctrine of *Local Loan Co.* v. *Hunt*, 292 U. S. 234 (1934). *Cf. Morrow* v. *District of Columbia*, 417 F. 2d 728, 737-741 (D. C. Cir. 1969). If Woodmar were successful in its state court action, the bankruptcy court's order of distribution would be nullified. It is true here, as it was in *Local Loan Co.* v. *Hunt*, that the federal court's jurisdiction is invoked by what is "in substance and effect a supplemental and ancillary bill in equity, in aid of and to effectuate the adjudication and order made by the same court." 292 U. S. at 239. No independent basis for federal jurisdiction is necessary in such an action. As the Court said in *Local Loan*,

> "That a federal court of equity has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein, is well settled. [Citations omitted.] And this, irrespective of whether the court would have jurisdiction if the proceeding were an original one. The proceeding being ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved, and notwithstanding the provisions of § 265 of the Judicial Code (R.S., § 720), U.S.C., Title 28, § 379 [predecessor of present 28 U.S.C. § 2283]." 292 U.S. at 239.

2.

Appellants argue that, by filing a motion to dismiss in the state court (which that court has not ruled on, so far as we are advised) and delaying one year in bringing this action, appellees have waived, or are estopped from asserting, their right to federal relief. There is no indication of an intent to relinquish the federal right, and therefore there was no waiver. Nor has there been the reasonable and detrimental reliance on the delay that would be required to establish an estoppel.

3.

28 U. S. C. § 2283 reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The "effectuate its judgments" exception was added in 1948 to permit a federal court to enjoin relitigation in a state court of a matter determined by a judgment of the federal court, thus abrogating *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118 (1941). 28 U. S. C. A. § 2283, Revisor's Note; 1A, Part 2 J. Moore, *Federal Practice* ¶ 0.208 [2]-[3] (2d ed. 1974); *Doe* v. *Ceci*, 517 F. 2d 1203, 1207 (7th Cir. 1975). As Justice Reed said in his *Toucey* dissent, the alternative to allowing such injunctions "is that a federal judgment entered perhaps after years of expense and money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication." 314 U. S. at 144.

The relitigation exception of § 2283 applies not only when the prior federal judgment is *res judicata* but also when the doctrine of collateral estoppel, or issue preclusion, is relied upon. *Inter-*

national Association of Machinists v. *Nix*, 512 F. 2d 125, 132 (5th Cir. 1975). We have even applied it to preclude an ancillary claim that could have been, but was not, asserted in the federal action, *Lee* v. *Terminal Transport Co.*, 282 F. 2d 805, 807 (7th Cir. 1960), *cert. denied*, 365 U. S. 828 (1961), but we need not go that far to decide the case at bar.

We noted earlier that the allegations made in Woodmar's state complaint were fully litigated and rejected by the bankruptcy court. If that court had accepted the allegations, it would have removed and surcharged the trustee and his attorney and ruled differently with respect to the allowance of the claims of the bondholders. Thus, the orders of the bankruptcy court declining to remove McLean and Davis as trustee and trustee's attorney, its later award of fees to them, and its ultimate distribution to the creditors, all rest on the rejection of Woodmar's allegations. McLean, Davis, and the bondholders were parties to the adjudication of Woodmar's allegations, and, under well-settled principles, they are entitled to injunctive relief against relitigation of the issues decided in their favor by the bankruptcy court.

The remaining appellants were not parties to the bankruptcy but were either attorneys for the parties or did business with the bankrupt estate by buying real estate or arranging sales. They are entitled, despite the absence of mutuality of estoppel, to assert collateral estoppel, or issue preclusion, as to issues sought to be relitigated in the Indiana action, Woodmar having had a full and fair opportunity to litigate those issues in the bankruptcy proceeding. *Federal Savings and Loan Insurance Corp.* v. *Hogan*, 476 F. 2d 1182, 1187 (7th Cir. 1973); *cf. Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); see also *Restatement (Second) of Judgments*, Appendix § 88, comment *b* at 162-163 (Tent. Draft No. 3, 1976). They are therefore entitled to an injunction against relitigation of those issues.

There are especially compelling reasons in the case at bar for applying the doctrine of issue preclusion in favor of nonparties.

Each of the appellants who was not a party to the bankruptcy proceeding participated in that proceeding in some way necessary to the administration of the estate. The Bankruptcy Act could not be properly administered without attorneys to appear on behalf of the parties, buyers to purchase the assets of the estate, or agents to handle the sales. These persons should be protected, for the same reason parties should be protected, from the burden and expense of relitigation in a state court. Especially is this so when the charges sought to be relitigated were found by this court fifteen years ago to have been made in bad faith. Injunctive relief is needed to preserve the full "fruits and advantages" of the federal judgment, see *Local Loan Co.* v. *Hunt, supra*, 292 U. S. at 239. Furthermore, allowing an unsuccessful litigant to harass other participants in the federal case flouts and may be said to "seriously impair the federal court's . . . authority to decide that case." *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers*, 398 U. S. 281, 295 (1970).[2]

The judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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2. In view of our disposition of the case it is unnecessary to address appellants' argument that only the trustee in bankruptcy may assert Woodmar's claim, compare *Chappel* v. *First Trust Co. of Appleton, Wisconsin*, 30 F. Supp. 765, 766-767 (E. D. Wis. 1940), with *Meyer* v. *Fleming*, 327 U. S. 161, 164-166 (1946), and 4A *Collier on Bankruptcy* ¶ 70.05 at 74 n. 40 (14th ed. 1976), or to consider whether, assuming this argument is correct, an injunction would be permitted by § 2283 in the absence of a prior adjudication of Woodmar's claim in the bankruptcy proceeding.

UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Hammond Division

SAMUEL C. ENNIS & COMPANY, INC. et al. *vs.* WOODMAR REALTY CO., et al.	Civil Action File No. H75-179

JUDGMENT

This action came on for trial (hearing) before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It is Ordered and Adjudged That the Defendants' Motion to Dismiss is Granted and That Plaintiff Take Nothing on Its Complaint.

Dated at Hammond, Indiana, this 17th day of October, 1975.

/s/ FRANCIS T. GANDYS
Clerk of Court

UNITED STATES DISTRICT COURT
Northern District of Indiana
Hammond Division

SAMUEL C. ENNIS & COMPANY, INC., Samuel C. Ennis, Donald C. Gardner, John G. Phrommer, Herschel B. Davis, Charles Levin, Floyd R. Murray, Edmond J. Leeney and Walter A. McLean, *Plaintiffs,* *vs.* WOODMAR REALTY COMPANY, an Indiana Corporation, and OWEN W. CRUMPACKER, *Defendants.*	No. H 75-179

ORDER

The defendants filed motion to dismiss on September 12, 1975 asserting the lack of jurisdiction of this Court under 18 U. S. C., § 2283. On the basis of the pleadings it appears that this Court does not have the requisite preliminary jurisdiction in this case. The plaintiffs' assertion as to res judicata can be raised and considered in the State Court proceedings. Therefore, the defendants' motion to dismiss is Granted.
Enter October 17, 1975.

/s/ ALLEN SHARP,
Judge, United States District Court.

On August 20, 1975 the plaintiffs brought an action in the U. S. District Court for the Northern District of Indiana, Hammond Division, for an injunction to enjoin the Woodmar Realty Company and its counsel from prosecuting a law suit in the Lake Superior Court Room No. One in Hammond. The complaint reads in pertinent part as follows:

"Come now Samuel C. Ennis & Company, Inc., Samuel C. Ennis, Donald C. Gardner, John G. Phrommer, Herschel B. Davis, Charles Levin, Floyd R. Murray, Edmond J. Leeney and Walter A. McLean, and complaining of the defendants say:

"1. That on to-wit: March 20, 1941, the defendant, Woodmar Realty Company, an Indiana corporation, was placed in reorganization under Chapter XI of the Bankruptcy Act, being Bankruptcy No. 3151 in this Court; that subsequently, on February 16, 1953, the said corporation was adjudicated a bankrupt and Walter A. McLean, a plaintiff herein, was duly appointed Trustee in Bankruptcy for said Bankrupt. That thereafter the bankrupt estate was duly administered by said Walter A. McLean to its conclusion on May 16, 1969, when the final report was approved by this Court, a copy of which final order is attached hereto and marked 'Exhibit A'.

"2. That all during the bankruptcy proceedings the defendant, Woodmar Realty Company, Inc., was represented by the defendant, Owen W. Crumpacker, as its attorney and financial provided in numerous facets of the litigation.

"3. That the principal claims against the assets of the said bankrupt were City of Hammond Improvement Bonds secured by liens on the real estate in the name of said bankrupt defendant.

"4. That the plaintiff, Samuel C. Ennis Company, Inc., and Samuel C. Ennis, were authorized by this Court to sell the real estate of the bankrupt at a commission approved by the Court. The proceeds received from the sale of said real estate

were held by the Trustee and the lien of the bondholders was transferred to the proceeds of the said sale to be distributed to the bondholders as determined by this Court.

"5. That the plaintiff, Donald C. Gardner and John G. Phrommer, were two of the many holders of said bonds who received their pro rata share of the proceeds of the sale of the said real estate, all as determined by order of this Court.

"6. That Walter A. McLean was at all times mentioned herein the duly appointed Trustee in Bankruptcy of Woodmar, all of whose acts were duly approved by order of this Court. That plaintiff, Herschel B. Davis, was the duly appointed and acting attorney for the said Walter A. McLean as Trustee in Bankruptcy.

"7. That the plaintiffs, Charles Levin, Floyd R. Murray and Edmond J. Leeney were attorneys for various bondholders in asserting their claims as owners of certain of the bonds.

"8. That on to-wit: March 3, 1974, the defendant, Woodmar Realty Company, Inc., by and through its attorney, Owen W. Crumpacker, filed an action naming the plaintiffs herein as defendants and alleging a cause of action for fraud against the plaintiffs herein, being Cause No. 174-439 in the Lake Superior Court, Hammond, Indiana and seeking to recover damages in the sum of Two Million Five Hundred Thousand Dollars ($2,500,000.00) from each of the said plaintiffs, a copy of said complaint is attached hereto, made a part hereof, and marked 'Exhibit B'.

"9. That said fraud is alleged to have occurred during the course of said bankruptcy, and if any fraud was committed as alleged in said complaint, the cause of action arising therefore would be an asset of the bankrupt; and any such action should be brought by a successor trustee to be appointed by this Court if such cause is determined to exist.

"10. That the charge of fraud on the part of these plaintiffs was made against some, if not all, of the plaintiffs during

the course of the bankruptcy proceedings and the Court found no fraud to exist.

"11. That the defendant's will pursue the action of the State Court against these plaintiffs unless restrained by order of this Court.

"WHEREFORE, the plaintiffs pray the Court:

"1. To issue a temporary injunction restraining the defendants from pursuing the cause of action entitled Woodmar Realty Company, An Indiana Corporation v. Samuel C. Ennis & Company, Inc., et al., Cause No. 174-439, in the Lake Superior Court, and upon hearing, enter a permanent injunction.

"2. That the plaintiffs and each of them be awarded actual and punitive damages and attorney fees each in the sum of Ten Thousand Dollars ($10,000.00)." (R. 3-5.)

EXHIBIT "A", omitting the caption, is as follows:

"ORDER APPROVING ACCOUNT, DISCHARGING TRUSTEE, AND CLOSING ESTATE

"At Hammond, Indiana, in said district, on the 16 day of May 1969.

"It appearing to the Court that Walter A. McLean, the Trustee in said cause has reduced the property and effects of said Bankrupt's estate to cash; that the said Trustee has made distribution thereof as required by the order of this Court and has rendered a full and complete account thereof, and that said Trustee has performed all other and further duties required of him in the administration of said estate;

"IT IS ORDERED that the accounts of said Trustee be and they are hereby approved and allowed and that the said estate be, and it is hereby closed; that the Trustee be discharged and relieved of his trust; and that the bond of said Trustee be canceled and the surety or sureties thereon released from further liability thereunder, except any liability which may have accrued during the time such bond was in effect." (R. 7.)

EXHIBIT "B", omitting the caption, is as follows:

"COMPLAINT

Count 1

"Comes now the Woodmar Realty Company, an Indiana corporation, and for cause of action against the defendants and each of them alleges and says as follows:

"(1) Woodmar Realty Company, an Indiana corporation, was incorporated on October 1, 1923. It has an authorized capital stock of 5,000 shares of One Hundred Dollars ($100) par value of which 2,406 are authorized and outstanding. Its Board of Directors consists of five (5) members, to-wit: Helen M. Woods, President, J. Carter Miller, Jr., Vice-President, William P. Wilke IV, Willard L. Bransky and Christine M. Jacewicz, Secretary-Treasurer. Its principal office is located at Room 300 Hammond Building, 5217 Hohman Avenue, Hammond, Indiana.

"(2) Defendant Samuel C. Ennis & Company, Inc., is an Indiana corporation with its principal offices at 5231 Hohman Avenue, Hammond, Indiana. It is and at all times mentioned herein was engaged in the purchase and sale of real estate in Lake County, Indiana and environs. Defendant Samuel C. Ennis resides on Hohman Avenue in Hammond, Indiana and at all times mentioned herein was the principal stockholder, president and agent of Samuel C. Ennis & Company, Inc., acting within the scope of his employment by Samuel C. Ennis & Company, Inc. and in furtherance of its business interests. Home Builders, Inc., an Indiana corporation, was formed and controlled by the defendants Samuel C. Ennis & Company, Inc., and Samuel C. Ennis for the purpose of acquiring and developing real estate procured by Samuel C. Ennis & Company, Inc. from one Charles L. Surprise, Trustee, now deceased, as reorganization trustee in Federal Court No. 3151, as more particularly appears hereinafter, and as John Doe trustee in Lake Superior Court Room Number Five, Cause No. 51815, entitled W. C.

Sibley et al. vs. The City of Hammond. Said Home Builders, Inc., now defunct, acting through employees of Samuel C. Ennis & Company, Inc., to-wit: Thor Kolle, now deceased; William Duncan, now deceased; and one Francis L. Wilson; conspired and confederated with Samuel C. Ennis & Company, Inc., Samuel C. Ennis and the other defendants to perpetrate the frauds on the Woodmar Realty Company as hereinafter alleged. Defendant Donald C. Gardner, is a resident of Hammond, Lake County, Indiana. He is and at all times mentioned herein was a business partner and associate of defendant John G. Phrommer, also a resident of Hammond, Lake County, Indiana. Said defendant Donald C. Gardner was a practicing attorney in Hammond, Indiana. He assumed the role of attorney for the John Doe trustee, Charles L. Surprise, now deceased, and, from May of 1941 through December 3, 1952, acted as co-counsel with attorney Rae M. Royce, now deceased, as attorneys for the Bondholders Protective Committee in the Woodmar Realty Company reorganization as hereinafter alleged. Defendants Herschel B. Davis, Charles Levin, Floyd R. Murray and Edmond J. Leeney are and at all times mentioned herein were practicing attorneys in Lake County, Indiana. Defendant Floyd R. Murray, initially, acted as a member of the Bondholders Protective Committee in the Woodmar Realty Company reorganization along with the former Assistant United States Attorney, C. Ballard Harrison; D. D. Bowser, a resident of South Bend, Indiana and former contract client of Lake Assessment Bond Service, Inc.; Frederick Lisius, a Hammond attorney, now deceased; and one Clarence Wefel, of Fort Wayne, Indiana, now deceased, a former contract client of Lake Assessment Bond Service, Inc. Defendant Walter A. McLean, a resident of Crown Point, Indiana, acted in the role of reorganization trustee in Federal Court No. 3151 under the initial appointment of the then District Judge, Luther M. Swygert. Defendant Richard F. Zilky, a resident of South Bend, Indiana, was a business associate of Donald C. Gardner. He also

acted in the role of a member of the Bondholders Protective Committee. In addition, defendant Zilky was a speculator in defaulted municipal bonds and conspired and confederated with the remaining defendants to perpetrate the frauds on the Woodmar Realty Company as more particularly alleged hereinafter. Each of the named defendants conspired and confederated pursuant to a common plan and scheme to perpetrate intentional and malicious frauds upon the Woodmar Realty Company and to abuse the processes of the state and federal courts in stripping Woodmar Realty Company of its valuable assets. The defendants, as more particularly alleged, either participated in the procurement of false and fraudulent decrees or, with knowledge of the frauds, joined the common plan, scheme and conspiracy.

"(3) The defendants and each of them willfully concealed their fraudulent plan and scheme. The Woodmar Realty Company was kept under court supervision and control until May 16, 1959 when reorganization no. 3151 was terminated. This action is being prepared, served and filed upon discovery of the necessary facts and circumstances previously concealed.

"(4) On January 13, 1941, plaintiff Woodmar Realty Company was the owner in fee simple of a square mile of improved real estate in the City of Hammond, Lake County, Indiana. It was and is the finest and most valuable residential and business property in Hammond. The real estate had a book value of $2,341,970 on March 20, 1941. The stockholders of Woodmar Realty Company consented to reorganization under Chapter X of the Bankruptcy Act (Chandler Act) because the company could not meet its debts as they matured due to the nationwide depression of the 1930's. Pursuant to a reorganization plan, the stockholders, in 1941, under the auspices of the United States District Court, compromised and paid $155,000 worth of delinquent real estate taxes at a figure of $12,500. This compromise was effected under a depression originated Indiana Tax Moratorium Law adopted for the exclusive benefit of the fee owners of real estate upon which taxes had become delin-

quent. In addition, again pursuant to an amended plan of reorganization, duly consented to and confirmed, the stockholders of Woodmar Realty Company who also held 1st mortgage bonds agreed to accept a conveyance of real estate appraised at $37,225 in full release and satisfaction of outstanding unpaid 1st mortgage bonds with a face value of $292,712.93. This settlement was approved and confirmed by an order entered on November 22, 1941 by the then Judge, the late Hon. Thomas W. Slick. In the 30½ years that have elapsed since Judge Slick approved the settlement and payment of the delinquent real estate taxes and 1st mortgage bonds, not a single creditor or stockholder has received a dollar out of the assets.

"(5) Jurisdiction of the United States District Court in Hammond was invoked through the filing of a creditor's petition under the Chandler Act. The creditor's petition was filed in the names of four holders of defaulted City of Hammond special improvement bonds: Delevan D. Bowser, Clarence Wefel, Orville Maxfield and Augusta Neumann. The special improvement bondholders were not and are not creditors of Woodmar Realty Company. The improvement bonds, issued under Indiana Statutes in the 1920's, were representative of lien rights in various subdivided and blocks of Woodmar Realty Company's real estate. Woodmar's assets consisted of 1540 ½ improved subdivided lots in the Woodmar subdivision, several unsubdivided blocks and real estate in two adjacent subdivisions, Columbia Heights and Flossmoor.

"(6) Unknown to the officers, directors and shareholders of Woodmar Realty Company, a collection agency, Lake Assessment Bond Service, Inc., had collection contracts with three out of the four defaulted improvement bondholders who signed the creditor's petition. Charles L. Surprise, a lawyer; Carl A. Huebner, a lawyer; and Clifford Etling, a public accountant; were the sole stockholders, directors and officers of Lake Assessment Bond Service, Inc. This Corporation, by its Articles of Incorporation, was formed to engage in the practice of law,

including conducting and managing litigation on defaulted improvement bonds. The attorney who filed the creditor's petition, Rae M. Royce, was secretly hired to do so by Lake Assessment Bond Service, Inc. Having instituted the proceedings, Charles L. Surprise and Carl A. Huebner, by the filing of false affidavits of 'disinterestedness,' procured appointments as Trustee and Trustee's attorney, respectively. (Violation of 78 U. S. C. 52.)

"(7) Surprise and Huebner, President and Vice-President of Lake Assessment Bond Service, Inc., respectively, set up a 'Bondholders Committee' in the spring of 1941. Two contract clients of Lake Assessment, Bowser and Wefel, were appointed to the committee. C. Ballard Harrison, Assistant United States District Attorney in Hammond, Hammond attorneys Floyd R. Murray and Frederick Lisius; and an improvement bond speculator, Richard F. Zilky; completed the membership of the 'Bondholders Committee.' Donald C. Gardner, a Hammond attorney, and Rae M. Royce, both secretly employed by Lake Assessment, procured appointments as attorney for the 'Bondholders Committee.'

"(8) Donald C. Gardner, Luther M. Swygert, Rae M. Royce, C. Ballard Harrison, Frederick Lisius and Floyd R. Murray were conducting statutory lien foreclosure actions on the defaulted improvement bonds in the state courts when the reorganization proceedings were commenced in the Federal Court. In cooperation with Trustee Charles L. Surprise and Trustee's attorney, Carl A. Huebner, they filed and caused to be filed verified proofs of claim against Woodmar Realty Company on the defaulted City of Hammond improvement bonds which were the alleged basis of the line foreclosure suits. Trustee Charles L. Surprise, Trustee's attorney, Carl A. Huebner and Clifford A. Etling, by virtue of collection contracts through Lake Assessment Bond Service, Inc., had a 30 percent interest in approximately $87,000 in face value of the lien claims thus filed.

"(9) During the first 2⅓ years that the reorganization proceedings were pending (January, 1941—October, 1943), Hammond attorney Luther M. Swygert was acting as co-counsel with Donald C. Gardner in eleven statutory foreclosure suits against Woodmar Realty Company brought on defaulted improvement bonds. (Gardner had 16 additional foreclosure suits against Woodmar which he was conducting.) Luther M. Swygert withdrew his appearance as attorney for the 'class plaintiff's in October of 1943 when he was appointed Judge of the United States District Court for the Northern District of Indiana and assumed jurisdiction of Woodmar Realty Company reorganization proceedings. Many of the improvement bondholders whom Luther M. Swygert and Donald C. Gardner had been representing in the eleven foreclosure suits had also filed verified proofs of claim against Woodmar in the reorganization proceedings.

"(10) In the statutory foreclosure actions, the first bondholder who filed suit obtained exclusive control over the lien rights against all of the lots. If the lawyer for the 'foreclosure plaintiff' made voluntary settlements with the landowner (as was often done), he was obliged to account for all holders of defaulted improvement bonds involved in the foreclosure, on a pro rata basis, for the sums collected. In addition, if real estate was bought in at foreclosure sale, the nominal bondholder purchaser was obliged to hold the same in trust for all holders of defaulted bonds. Donald C. Gardner, Judge Swygert's associate, by his own admission, failed to make an accounting to bondholders for monies collected in the statutory foreclosure suits. When interrogated in the fall of 1947 as to the disposition of real estate acquired at foreclosure sales, he took the Fifth Amendment not less than eighteen times. Illustrative is the following testimony of Gardner:

> 'Q. I show you plaintiff's Exhibits 59-1 which is a quit claim deed from John A. W. Hansingford to Marion Ledgerwood, which is one of the number of deeds we have already identified and I wish you would please look at the

> signature and tell me whether or not as to that particular deed the signature of Hansingford is in your own handwriting?
>
> 'A. Again, I am going to have to stand on my constitutional rights and refuse to answer any questions which might tend to incriminate me.
>
> 'Q. I show you plaintiff's Exhibits 59-1 ask you, in connection with that deed, if the handwriting of Hansingford is or is not in your own handwriting?
>
> 'A. I refuse to answer the question on the same grounds.
>
> 'Q. That is, on the ground that it would tend to incriminate you?
>
> 'A. It might tend to incriminate me.' (Testimony of Donald C. Gardner, September 22, 1947.)

"(11) By the terms of the amended plan of reorganization, consented to by a majority of the stockholders, Trustee Surprise was required to complete the reorganization, by the issuance of stock, within two years after November 22, 1941. The two years expired approximately one month after Luther M. Swygert was appointed to the Federal bench.

"Following the appointment of Judge Swygert, no effort was made on the part of the Trustee, the Trustee's attorney, the Bondholders Committee or counsel for the Bondholders Committee to reorganize the compony through the issuance of new stock.

"(12) Instead of reorganization, Surprise and Carl A. Huebner, with the knowledge, cooperation and consent of the Bondholders Committee and its counsel, Donald C. Gardner, procured the employment of Samuel C. Ennis & Company, Inc. as sales agent (in 1943) and December 31, 1950, Samuel C. Ennis & Company, Inc. sold all of Woodmar Realty Company's real estate, receiving 15 percent of the gross sales prices as a commission. The officers and directors of the sales agent, Samuel C. Ennis & Company, Inc., formed a building corporation, Home Builders, Inc. Samuel C. Ennis & Company, Inc.

then sold approximately one-third of the residential building lots belonging to Woodmar Realty Company to Home Builders, Inc. Home Builders, Inc. was required to pay only $25 per lot down and the balance when a house was constructed and sold under an F. H. A. loan. The balance of the purchase price was ordinarily $175 per lot. In selling the completed home, Home Builders, Inc. included the lot in the sale price at a figure of from $1200 to $1500. Samuel C. Ennis & Company, Inc. also collected a 15 percent commission from the Trustee Surprise on the sales to Home Builders, Inc. In addition, the officers and directors of Samuel C. Ennis & Company, Inc., by virtue of their ownership of Home Builders, Inc., made a substantial profit on the building program. This situation, necessarily, constituted a devastation of the assets of the estate. Further, Trustee Surprise, through Samuel C. Ennis & Company, Inc., sold parcels of real estate to Donald C. Gardner and his business associate, John G. Phrommer, as well as Richard F. Zilky, a court-appointed fiduciary. In at least five instances, Samuel C. Ennis & Company, Inc. paid a 5 percent 'kickback' of the commission received to Trustee Charles L. Surprise. The sales to Home Builders, Inc. and the court-appointed fiduciaries were in violation of Federal Criminal Law reading in pertinent part as follows:

> 'Whoever, being a referee, receiver, custodian, trustee, marshal, or other officer of the Court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a bankruptcy proceeding;' etc. 'shall be fined not more than $500.00 and shall forfeit his office, which shall become vacant.' (18 U. S. C. Par. 154.)

"(13) The secret interests of Trustee Charles L. Surprise and Trustee's attorney, Carl A. Huebner, in special assessment bond claims (through Lake Assessment Bond Service, Inc.), the fact that they had prepared and filed false oaths of 'disinterestedness' to secure their appointment as fiduciaries, the fraudulent sales program under which the sales agent Samuel C.

Ennis & Company, Inc. sold Woodmar Realty Company's real estate to its own building corporation, Home Builders, Inc., the receipt of 'kickbacks' by Trustee Surprise and Samuel C. Ennis & Company, Inc., the buying in of real estate in fictitious names and failing to account for monies collected and the employment of Gardner, Harrison and Royce by Lake Assessment Bond Service, Inc. were first learned by Woodmar's attorney during the trial of a taxpayer's case in the Porter Circuit Court at Valparaiso, Indiana, which commenced on September 8, 1947. The court-appointed fiduciaries, Charles L. Surprise, Carl A. Huebner, Donald C. Gardner and C. Ballard Harrison, acting in conspiracy with certain city officials, had procured 124 judgments totalling $958,000 through fraud practiced upon the Lake Superior Courts and the City of Hammond. The proceedings in the Porter Circuit Court were highly publicized in the newspapers. Extensive findings were entered by the Porter Circuit Court on September 7, 1948, which findings were later affirmed on appeal, to the Indiana Appellate Court in the case *Gilkison, et al* v. *Darlington, et al.* (1952) 123 Ind. App. 28; 106 N. E. 2d. 473. In a related case, growing out of the same conspiracy, in commenting on the conduct of Trustee's attorney, Carl A. Huebner, Judge Emmert of the Indiana Supreme Court stated:

> 'The fraud charged in the indictment is so rarely attempted that there are few authorities on the subject matter. Such evil and depraved acts are seldom attempted by an attorney, a sworn officer of the court, whose first duty it is to be honest to the Court and assist it in doing right and justice***. The evils of such conduct by far transcend the defrauding of widows and *orphans,* for the very foundation for administering justice between litigants is the court's ability to ascertain the facts.'

"(14) Trustee Charles L. Surprise, Trustee's attorney, Carl A. Huebner, Judge Swygert's associate, Donald C. Gardner (attorney for the Bondholders Committee) and Assistant United States Attorney C. Ballard Harrison, were indicted by state authorities for frauds and perjuries arising out of their activities

in the state courts in connection with defaulted improvement bond matters. Cognizant of these indictments, Federal Judge Luther M. Swygert called a meeting in the Woodmar case on December 8, 1948, at which meeting he stated:

> 'But, anyway, as all of you are aware, the Trustee, the Trustee's counsel, one member of the Bondholders' Committee, and one counsel for the Bondholders' Committee were involved in those proceedings, and as a result are under indictment in the Lake Criminal Court.' (Exhibit No. 78, pp. 23-24, inc.)
>
> * * * * *
>
> '(a) 19 U.S.C.A. 401 *Contempts, Power of Court*:
>
> 'A court of the united States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;'
>
> '(b) 18 U.S.C.A. 1503, *Obstruction of Justice, Influencing or Injuring Officer, juror or witness generally:*
>
> *'Whoever, corruptly * * * or by any threatening letter of communication influences, obstructs, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.'* June 25, 1948, c. 645, 62 Stat. 769.
>
> '(c) 18 U.S.C.A. Par. 371, *Conspiracy to commit fjense or to defraud United States*: (obstruct administration of justice).
>
> 'If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> 'If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment provided for such misdemeanor.'

"(40) As heretofore alleged, many of the earlier fiduciaries, such as Charles L. Surprise, Trustee; Donald C. Gardner and Rae M. Royce, attorneys for the Bondholders Protective Committee; and the seven members of the Bondholders Protective Committee itself were removed by the order entered by the District Court on December 3, 1952. Woodmar Realty Company and its stockholders, through great effort, out-of-pocket costs and dogged persistence, had succeeded in protecting the remainder of the cash assets from utter devastation at the hands of the fiduciaries. But the void created through the removal of fiduciaries was quickly filled by Attorney Albert H. Gavit, now deceased, who represented Carl A. Huebner in criminal proceedings and in the disbarment and readmission cases. Defendant Charles Levin bought out Donald C. Gardner's law practice (and clients such as Richard F. Zilky) when Gardner was forced to resign from the Indiana Bar. Defendants Edmond J. Leeney and Floyd R. Murray became active on behalf of the former clients of C. Ballard Harrison. Having secretly guided defendant Herschel B. Davis and accountant McCall in the 'auditing study' program of circumventing the District Court's findings of October 29, 1952 and the decree of December 3, 1952, they joined with defendants Walter A. McLean, as trustee, and Herschel B. Davis as trustee's attorney, in attempting to eliminate Woodmar Realty Company's objections to the 'Trustee's Final Report and Proposed Allocation of Assets to Claims' filed on September 7, 1955. In collaborating with defendants McLean and Davis, Albert H. Gavit, Edmond J. Leeney, Floyd R. Murray and Charles Levin procured a violent breach of trust. Instead of defending the trust assets, in accordance with their sworn duties, defendants McLean and Davis undertook to promote the scheme and plan of preventing any inquiry into or disclosure as to who the real parties in interest were behind the so-called class -2 lien claims.

"(41) The trustee, Walter A. McLean, and his attorney, Herschel B. Davis, sought to dismiss the appeal on the ground

that *Woodmar Realty Company was not a party in interest.* In making this contention, they were joined by Hammond attorneys, Edmond J. Leeney, Floyd R. Murray, Charles Levin and Albert H. Gavit of Gary. These attorneys spearheaded the so-called class-2 creditors. The class-2 creditors were the purported holders of defaulted City of Hammond special improvement bonds.

"The special improvement bonds were representative only of lien rights against Woodmar Realty Company's real estate. The lien rights varied under many separate improvement resolutions. Many of the special assessment liens were spread on adjoining lands in which Woodmar Realty Company had no interest. *In no instance were class-2 creditors actual creditors of Woodmar Realty Company.* Woodmar Realty Company did not contract with any City of Hammond bondholders. In selling the real estate, Charles L. Surprise, as trustee, made no effort to segregate lien rights against real estate sold. A substantial portion of Woodmar Realty Company's lands were free and clear of liens of any kind. *The proceeds of the sales of this real estate were not subject to any lien claims.* Trustee Walter A. McLean and his attorney, Herschel B. Davis, referred to the proceeds of the sales of lands unaffected by liens as the trustee's 'general fund.' (Also, many of the liens had lapsed and ceased to exist prior to January 13, 1941 when the reorganization proceedings were instituted.)

"(42) In reversing the decision of the District Court, Circuit Judge Swain, speaking for the Court, stated:

> 'On September 27, 1955, the bankrupt and certain of its stockholders filed objections to the allowance of claims. The trustee and certain creditors filed motions to strike the objections on March 5, 1966, the District Judge granted the motions to strike on the ground that the bankrupt and its stockholders were not 'parties in interest,' and thus were without standing to object to the allowance of claims. The claims objected to constitute approximately three-fourths of the claims in amount filed against the

> bankrupt's estate. The action taken on these claims will determine whether there will be a surplus available for the bankrupt.'
>
> * * * * *
>
> 'The bankrupt has been permitted to object to the allowance of claims in cases where in the event of disallowance there would be a surplus left for the bankrupt. in re Povill, 2 Cir., 105 F. 2d 157; In re Witherbee, 1 Cir., 202 F. 896. The bankrupt here has brought itself within this exception to the general rule. The bankrupt's interest in having claims in excess of $300,000 disallowed, in which event a substantial surplus would be available for the bankrupt, is obviously real, and the conclusion is inescapable that under these circumstances the bankrupt is a 'party in interest.'' (241 F. 2d 770, 771)

"On remand, the decision and opinion of the Seventh Circuit Court of Appeals became binding upon the District Court as the law of the case in all further proceedings. It also became binding upon the Seventh Circuit Court of Appeals, as the law of the case, in any and all further appeals from orders entered in later stages in the proceedings.

"(43) The mandate of the U. S. Circuit Court was filed with the District Court on April 10, 1957. At a pre-trial conference in Layfayette, Indiana on June 28, 1957, with the acquiesence of all parties in interest, trustee Walter A. McLean and his attorney, Herschel B. Davis, were to step aside and permit Woodmar Realty Company to defend the estate against approximately 300 hostile, adverse lien claims classified as class-2 claims. Lien claim no. 441 was assigned for pre-trial conference on July 10, 1957 and trial on July 15, 1957. Because of the fact that the rulings of the District Court in Claim No. 441 would set a pattern with reference to other lien claims, the attorneys for other lien claimants were invited to attend the trial.

"(44) At the July 10, 1957 pre-trial conference, attorneys Edmond J. Leeney and Floyd R. Murray representing the lien claimants, stated that the auditor who had performed

the 'audit study,' McCall, had permanently left the jurisdiction of the Court to reside in Arizona. The District Court determined that, because only lien rights were involved, the burden of proof was on the lien claimants to establish the existence of the lien, the amount thereof and the burden of tracing the lien rights into the assets on hand. Claim No. 441 was tried on July 15 and 16, 1957 and taken under advisement. At the suggestion of the Court, Woodmar Realty Company was given the right to settle lien claims with the approval of the Court. Woodmar Realty Company entered into settlement stipulations with 105 lien claimants. None of the non-settling lien claimants objected to the stipulations. Following a hearing and on January 19, 1960, the District Court rejected the settlement stipulations. On appeal and on November 23, 1960, the Court of Appeals reversed the January 19, 1960 decision. The Court of Appeals established additional law of the case as follows:

'Over 300 lien claims were filed in the district court by holders of improvement bonds and coupons, and are known as 'Class 2' claims. No objections thereto were filed by the then trustee, Charles L. Surprise, or his successor, Walter A. McLean, appellee herein, although the court's order of November 22, 1941 authorized such action. Prior to January 30, 1951, trustee Surprise, under court orders, had sold all of Woodmar's real estate, free of the improvement bond and coupon liens.'

* * * * *

'Judge Parkinson requested Woodmar to undertake the responsibility of negotiating with the Class 2 claimants for a compromise of their claims. On July 22, 1957, the bankrupt formally filed a petition for such authority and Judge Parkinson entered an order accordingly, which provided that any compromise agreement was to be subject to the approval of the court. It is undisputed that it was the desire and judgment of Judge Parkinson that the trustee and his counsel were to remain passive with respect to the efforts of Woodmar and its counsel to negotiate settlements.'

* * * * *

'After some small general claims, as well as some preferred claims, such as taxes, attorneys' fees and other costs of administration of the bankrupt estate, there remained to be satisfied only the Class 2 claimants. *The balance of this depleted fund would become the property of Woodmar.* The more that was allowed the lien claimants, the less Woodmar would recover from its property. The less that the claimants would receive, the more Woodmar would recover.'

* * * * *

'Although the first trustee appointed had been authorized by the district court to file objections to the claims filed by the lien holders, both he and appellee, his successor, failed to do so and thereupon Woodmar itself filed such objections, after we held that it was entitled to do so.'

* * * * *

'The pending litigation was in reality between Woodmar and the lien holders. Whether it was litigated to a finish or settled, they were the ones who would ultimately be affected thereby. Such litigation was really an ordinary civil controversy. The parties, whether in litigating in the courtroom or in settling outside the courtroom, were engaged in an adversary activity and dealing at arm's length.' (re: Woodmar Realty Company (1960) 284 F. 2d 815.)

"(45) Woodmar Realty Company filed motions with the District Court for orders consummating the settlement stipulations in accordance with the mandate and opinion of the Court of Appeals which, likewise, became the law of the case. In addition, Woodmar Realty Company filed written requests that the unsettled lien claims be set down for trial in accordance with the procedures agreed upon in Lafayette, Indiana on June 28, 1957. In addition, Woodmar Realty Company filed separate motions to strike and dismiss abandoned lien claims.

"(46) Woodmar Realty Company's petition to remove the trustee and trustee's attorney, Herschel B. Davis, was dismissed without an evidentiary hearing. The dismissal was affirmed on appeal. Thereafter, several opinions were rendered by the Dis-

trict Court on Claim No. 441 which became the basis for a motion for summary judgment filed by the trustee at the suggestion of the District Court. Woodmar Realty Company, at a further pre-trial conference, was ordered to file separate statements of fact with reference to class-2 lien claims. Commencing in July of 1963, a series of orders were entered purporting to 'allow' class-2 lien claims in amounts shown by the trustee's final report and proposed allocation of funds to lien claims.

"(47) On April 28, 1964, the District Court vacated its order of July 21, 1961 approving certain settlement stipulations and undertook to reinstate 102 class-2 lien claims. *None of the reinstated class-2 lien claims were involved in the motion for summary judgment or the so-called statement of facts which Woodmar Realty Company was ordered to file. On motion of trustee Walter A. McLean and on May 15, 1964, additional lien claims were 'allowed' without hearing or proof.* The trustee, thereupon, filed a supplemental final report with proposed allocations of Woodmar Realty Company's cash assets. Woodmar Realty Company and the City of Hammond filed specific written objections to the trustee's fee petition and the fee petition of the attorneys for the trustee. The objections of the City of Hammond and the objections of Woodmar Realty Company were overruled on January 19, 1966. The rulings were affirmed on appeal.

"(48) On February 26, 1968, the District Court entered an order authorizing the trustee to disburse the sum of $396,363.34 to lien claimants in accordance with the District Court's order dated February 10, 1966. The fees allowed to the trustee and trustee's attorney were paid. Disbursements were made by checks drawn on the Gary National Bank, said checks being signed by trustee Walter A. McLean and countersigned by the District Judge. By May 16, 1969, distribution had been made pursuant to the order of February 26, 1968. On May 16, 1969, trustee Walter A. McLean filed a report of distribution and, simultaneously, the District Court entered an order approving the

account, discharging the trustee and closing the estate. *By virtue of the order of May 16, 1969, Woodmar Realty Company was freed of its trusteeship for the first time since January 24, 1941.*

"(49) On May 16, 1969, when Woodmar Realty Company finally emerged from 'reorganization,' stripped of its assets, the 1540½ improved lots in the Woodmar subdivision, the nine unsubdivided blocks and the real estate in the two adjacent subdivisions, Columbia Heights and Flossmoor, had a market value, according to the tax assessor's records, in excess of $25,000,000. These assets were destroyed and misappropriated through the abuse and misuse of the processes of the Federal Court as under the broad jurisdiction afforded by the Chandler Act. Defendants Samuel C. Ennis & Company, Inc., Samuel C. Ennis, Donald C. Gardner, John G. Phrommer and Richard F. Zilky were able to reap illegal profits through buying in and reselling Woodmar Realty Company's assets in the hands of the trustee, Charles L. Surprise. Defendant Herschel B. Davis, by joining in the plan and scheme and in violating his trust duties, profited in that he was awarded approximately $125,000 in fees out of Woodmar Realty Company's assets. Defendant Walter A. McLean was compensated out of the trust for his connivance and collaboration with defendants Donald C. Gardner, Charles Levin, Edmond J. Leeney and Floyd R. Murray. Defendants Leeney and Murray set up an 'escrow account' in the Mercantile National Bank of Indiana for the purpose of segregating distribution checks written by trustee Walter A. McLean and countersigned by District Judge Robert E. Tehan, on the trustee's account in the Gary National Bank. In all of these activities, the named defendants undertook to make certain that the assets were misappropriated.

"(50) By virtue of the above and foregoing, the plaintiff Woodmar Realty Company has suffered damage and losses in the amount of $2,500,000.

"WHEREFORE, plaintiff prays judgment against the defendants and each of them in the amount of $2,500,000 together with its costs expended." (R. 8-38)

On September 12, 1975 the Woodmar Realty Company filed its "Motion to Dismiss" with a supporting memorandum. The Motion to Dismiss and Memorandum are as follows:

"MOTION TO DISMISS

"Comes now Woodmar Realty Company, an Indiana Corporation, and Owen W. Crumpacker, defendants and, pursuant to FRCP 12(b)(1) and (2) move the court to dismiss the complaint for each and all of the following reasons:

"(1) The court is without jurisdiction to enjoin the defendants from prosecuting their case in the Lake Superior Court Room No. One, under cause No. 174-439. 28 USCA § 2283.

"(2) Exclusive jurisdiction in the Lake Superior Court Room No. One of the subject matter of Cause No. 174-439 was conceded by the plaintiffs herein when they appeared in set cause of action over a year ago and invoked the jurisdiction of the Lake Superior Court Room No. One to dismiss the complaint.

"(3) The complaint fails to set a claim upon which relief can be granted.

"(4) Plaintiffs and defendants are residents and citizens of Indiana.

"WHEREFORE, defendants pray that, on notice and hearing, the case be dismissed with prejudice." (R. 43)

"MEMORANDUM

"Congress, wisely, limited the jurisdiction of the Federal Court to interfere with state court actions. 28 USCA § 2283 provides that:

'A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. June 25, 1948, c. 646, 62 Stat. 968.'

"The Federal Court lost jurisdiction of the Woodmar Realty Company on May 16, 1959 when the reorganization was terminated.

'28 USCA § 2283 is designed to prevent conflict between federal and state courts. Leiter Minerals, Inc. v. U. S., La. 1957, 77 S. Ct. 287, 352, U. S. 220, 1 L. Ed. 2d 267, rehearing denied 77 S. Ct. 553, 352 U. S. 1019, 1 L. Ed. 2d 560. Holcomb v. Aetna Life Ins. Co., C. A., 10th 1955, 228 F. 2d 75, certiorari denied 76 S. Ct. 473, 350 U. S. 986, 100 L. Ed. 853. 28 USCA § 2283, expresses the duty of 'hands off' by federal courts in the use of injunctions to stay litigation in the state court. Amalgamated Clothing Workers of America v. Richman Bros. Co., C. A. 6th, 1954, 211 F. 2d 449, certiorari denied 75 S. Ct. 43, 348 U. S. 813, 99 L. Ed. 600, affirmed 75 S. Ct. 452, 348 U. S. 511, 99 L. Ed. 641. Federal Court cannot interfere in case where proceedings are already pending in state court. Ackerman v. International Longshoremen's & Warehousemen's Union, C. A. 9th, 1951, 187 F. 2d 860, certiorari denied 72 S. Ct. 85, 342 U. S. 859, 96 L. Ed. 646.'" (R. 44)

On October 2, 1975 the plaintiffs moved for a summary judgment, as follows: (omitting the caption)

"PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

"Plaintiffs move the Court for summary judgment in their favor and against the defendants on the grounds that the pleadings and affidavits filed in support hereof show that there is no genuine issue as to any material fact, and that plaintiffs are entitled to judgment as a matter of law.

"The matter on which the plaintiff seeks relief in the state court proceeding was fully adjudicated by this Court 'In the matter of the Woodmar Realty Company, Bankrupt, Bankruptcy No. 3151.'" (R. 45)

On October 17, 1975 the court sustained appellants' Motion to Dismiss. The Order omitting the caption reads as follows:

"ORDER

"The defendants filed motion to dismiss on September 12, 1975 asserting the lack of jurisdiction of this Court under 18 U. S. C., § 2283. On the basis of the pleadings it appears that this Court does not have the requisite preliminary jurisdiction in this case. The plaintiffs' assertion as to res judicata can be raised and considered in the State Court proceedings. Therefore, the defendants' motion to dismiss is Granted." (R. 58)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-849

WOODMAR REALTY COMPANY, An Indiana Corporation, and OWEN W. CRUMPACKER,

Petitioner,

vs.

SAMUEL C. ENNIS & COMPANY, INC., SAMUEL C. ENNIS, MERCANTILE NATIONAL BANK OF INDIANA, As Executor Under the Last Will and Testament of Donald C. Gardner, Deceased, JOHN G. PHROMMER, HERSCHEL B. DAVIS, BEATRICE LEVIN, Executrix Under the Last Will and Testament of Charles Levin, Deceased, FLOYD R. MURRAY, EDMOND J. LEENEY and WALTER A. McCLEAN,

Respondents,

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EDMOND J. LEENEY
5231 Hohman Avenue
P.O. Box 1158
Hammond, Indiana
46325

Attorney for Respondents

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RESPONDENT'S BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Rule 24(1) of this Court's rules permits a respondent to a petition for writ of certiorari to file an opposing brief "disclosing any matter or ground why the cause should not be reviewed by this court." On behalf of the respondents, we now undertake to present such a brief.

At the outset, we must admit that we have failed in our efforts to glean from the particular petition under consideration the precise ground or grounds urged by the petitioners as a justification for the allowance of the writ. The petition appears to be nothing more than a rambling outpouring of the petitioners' conceptions and recollections of the fortunes and misfortunes of the Woodmar Realty Company during its twenty-eight years of proceedings under the Bankruptcy Act. In addition, the petitioners have woven a tale into the petition of a massive conspiracy to defraud the Woodmar Realty Company of its assets during its many long years of captivity at the hands of the federal courts under the Bankruptcy Act - a conspiracy allegedly joined in and implemented by certain federal judges, attorneys, trustees in bankruptcy, realtors and others.

The only message which the petition appears to deliver with any clarity is the fact that the petitioners are dissatisfied with the decision of the Seventh Circuit Court of Appeals in this case. Otherwise, the petition is so weighted down with confusing and malicious verbiage as to justify its denial under this Court's Rule 23(4):

> "4. The failure of a petitioner to present with accuracy, breavity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

We do not believe that any useful purpose will be served if we permit ourselves to be drawn into the labyrinth of accusations, innuendos, half-truths, falsehoods and grumblings which characterize the petition. The issue at this juncture in the proceeding is whether the cause should be reviewed by this Court. We have attempted in this brief to limit our discussion to those considerations which are relevant to the determination of that issue.

SUMMARY OF ARGUMENT

The Court of Appeals was correct in holding that the state court action filed by the petitioner Woodmar Realty Company sought to raise issues which had been previously adjudicated during the Woodmar Realty Company's bankruptcy proceedings, and that the bankruptcy court was in error when it refused to enjoin the prosecution of the state court action in order to protect or effectuate the judgments of the bankruptcy court.

ARGUMENT

The decision rendered in this case by the Court of Appeals was centered primarily around the relitigation exception contained in 28 U.S.C. §2283, hereinafter referred to as "§2283," which reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The Court of Appeals held, of course, that §2283 not only permitted but necessitated the injunctive relief sought by the respondents in the District Court.

It becomes readily apparent from even the most superficial research efforts that §2283 has in recent years been a frequent object of interpretation and application by the federal courts. Equally apparent is the fact that the Court of Appeals did not engage in the blazing of any new trails with respect to the nature of the issues before it or the manner in which it disposed of those issues. There is nothing new or novel about the holding of the Court of Appeals.

Moreover, we are not aware that the holding in this case by the Court of Appeals is in conflict in any respect with any decision of any of the other Courts of Appeal or of this Court. Certainly, if such a conflict exists, no mention of it appears in the petition.

The case at hand represents a classic example of the need for the relitigation exception in §2283. The agonies of the Woodmar Realty Company under the Bankruptcy Act spanned a twenty-eight year period commencing in 1941 and ending in 1969, starting with reorganization proceedings which were eventually converted into a

straight bankruptcy. Out of the ordeal came eight appeals to the Court of Appeals including three denials of certiorari by this Court. (See footnote, A.3)

During the entire period, Woodmar Realty Company was represented by attorney Owen W. Crumpacker, who with Woodmar Realty Company, is a petitioner in this proceeding. After the matter was converted into a straight bankruptcy, Mr. Crumpacker persistently exhibited an obsession for accusing practically everyone involved in the proceedings of fraud in one form or another, having as its common purpose the misappropriation of the assets of the Woodmar Realty Company. These accusations were from time to time duly examined by the District Court and the Court of Appeals and were found to be without foundation. By the time the proceedings were terminated in 1969 all issues raised by the allegations of fraud in the straight bankruptcy had been decided against the petitioners.

Five years later in September of 1974 Woodmar Realty Company, with Mr. Crumpacker as its attorney, filed an action in an Indiana state court against the respondents for $2,500,000.00. The complaint in that action sought to exhume all of the various fraud issues which had been laid to rest in the bankruptcy proceedings. It was the prosecution of this action which the respondents sought to enjoin before the District Court. The District Court sustained the petitioners' motion to dismiss with the observation that the respondents' defense of res judicata could be raised and considered by the Indiana state court. (A.11) This was no answer, however, to the respondents' contention, as stated in their complaint and brief in support of their motion for summary judgment, that the fraud

action in question could only be maintained by a trustee in bankruptcy. Otherwise, what would prevent the petitioners, in the event of a recovery, from ignoring the rights of the bankruptcy creditors and pocketing the money themselves?

It is true, in line with the District Court's ruling, that the respondents could have raised the doctrines of res judicata and collateral estoppel in the state court. Of course, if the state court had rejected the applicability of those doctrines the respondents' only recourse would have been to pursue appeals of the matter through the highest courts of Indiana and then, if necessary, to this Court. The relitigation exception contained in §2283 obviates the need for such an expensive and drawn out procedure which, incidentally, is not without its perils.

In Woods Exploration and Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (CA 5, 1971), the Court of Appeals of the Fifth Circuit agreed that the relitigation exception "prevents multiple litigation of the same cause of action and it assures the winner in a federal court that he will not be deprived of the fruits of his victory by a later contrary state judgment which the Supreme Court may or may not decide to review." (438 F.2d 1286, 1312)

In the more recent case of International Association of Machinist & Aerospace Workers v. Nix, 512 F.2d 125 (CA 5, 1975), that same court commented:

> "In these circumstances, a federal court need not stand idly by and hope that the state court perceives that

> the issues before it formed the basis of prior federal court litigation. Rather the federal court may intervene, pursuant to §2283, 'to protect or effectuate its judgments.'" (512 F.2d 125, 132)

Although bankruptcy is a subject which is entirely within the domain of federal law, and although the state court action in question, if pursued to a final disposition, would require the state court to invade an area pre-empted by federal law, the respondents concede that these circumstances alone would not afford a basis for the District Court's entry of an injunction against further pursuit of the state court action. Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

The case at hand, however, contains an additional ingredient. As the Court of Appeals observed, if the respondent Woodmar Realty Company were successful in the state court action, the bankruptcy court's order of distribution would be nullified. (A.6) In other words, a potential risk presented by the pending state court proceeding would be the destruction of the results of many years of effort on the part of the bankruptcy court. Obviously, Woodmar Realty Company's success in the state court action would leave the jurisdiction and authority of the bankruptcy court over the Woodmar Realty Company bankruptcy in a complete shambles.

Such a result, or even the risk of such a result, need not and should not be

tolerated by the bankruptcy court in view of the clear language of §2283. Congress has spelled out those circumstances under which a federal court may grant such an injunction. That such an injunction is "necessary and in aid of" the jurisdiction of the bankruptcy court and essential in order for the bankruptcy court "to protect or effectuate its judgments" is too obvious in this instance to be seriously questioned.

We believe that we should comment upon the petitioners' statement of the questions presented by the petition as set forth on page 2 of the petition. The first of those questions has been stated in the petition as follows:

> "Whether the limitations on the right of federal courts to enjoin state court litigation by virtue of U.S.C.A., Title 28, §2283, are abrogated by the re-litigation exceptions grafted on the statute by judicial interpretation under the ruling of the Seventh Circuit Court of Appeals complained of."

Obviously, the ruling of the Court of Appeals in this case "grafted" nothing on §2283. The relitigation exception was the work of Congress, not the Court of Appeals. The second of the questions presented as set forth in the petition is the following:

> "Whether the exception to the limitations placed on federal courts' power to enjoin litigation in a state court by 28 U.S.C.A. §2283 under the decision in Local Loan v. Hunt,

> (1934), 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 is broad enough to enjoin a former debtor in a twenty-eight year Chandler Act proceedings from bringing a damage suit against fiduciaries and their collegues for malicious abuse of process."

The foregoing question is incomprehensible. Section 2283 did not even exist in its present form at the time of the decision in Local Loan v. Hunt, supra, i.e., the relitigation exception was not added to §2283 until 1948, fourteen years after Local Loan v. Hunt. Moreover, for reasons not understood by us, the petitioners have chosen to refer to the Woodmar Realty Company as the "debtor" in the foregoing question and elsewhere in the petition instead of as the "bankrupt," the proper term. Frequently in the petition the petitioners have seemingly ignored the fact that ultimately the federal proceedings in question moved from reorganization proceedings into a straight bankruptcy. Finally, the state court action is characterized in the question as being one for "malicious abuse of process." A reading of the complaint filed in that action (set forth in part in the Appendix, pages A15 through A31), if one is energetic enough for such an accomplishment, reveals that the action was for fraud. However, regardless of the terminology used to characterize the action, it is clear that the issues which the complaint sought to raise were issues with which the bankruptcy court had dealt at one time or another during the course of the proceedings under the Bankruptcy Act.

The third of the questions presented,

as set forth in the petition, is the following:

> "Whether the dismissal of a petition to remove a court appointed trustee and trustee's attorney in a corporate reorganization proceeding on motion for want of facts constitutes an adjudication which can be the basis for ancillary jurisdiction in the federal court to enjoin state court proceedings instituted by the former corporate debtor in reorganization notwithstanding the limitation placed on federal courts under 28 U.S.C.A. §2283."

The foregoing question represents an effort to grossly distort the nature and scope of the issues actually presented by the petition. The ruling by the bankruptcy court on the petition filed by the bankrupt to remove the trustee and the trustee's attorney was but one of many rulings made by the bankruptcy court. The suggestion that this particular ruling constituted the adjudication which the respondents sought to protect when they filed a suit for injunctive relief in the District Court is merely typical of the distortions which permeate the petition. Obviously, if Woodmar Realty Company were successful with its state court action, the effect would be to undo a great deal more than merely the ruling on the petition to remove the trustee and the trustee's attorney.

We are at a loss to understand why the petitioners have laid so much stress upon that particular ruling. Perhaps the

reason stems from the fact that during the course of the Court of Appeals' affirmation of the ruling made by the bankruptcy court, the charges against the trustee and the trustee's attorney were found to have been made in "gross bad faith." In re Woodmar Realty Co., 294 F.2d 785, 789. In that decision, the Court of Appeals came down hard on Mr. Crumpacker because of his reckless and irresponsible charges of fraud.

We close with the comment that, although we pride ourselves in this country on the right of every litigant to have his day in court, we do so with an awareness that one's right to a day in court means nothing if the day in court settles nothing. The Woodmar Realty Company bankruptcy has been laid to rest. May it henceforth rest in peace.

CONCLUSION

For the reasons stated above, the respondents say that the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDMOND J. LEENEY
5231 Hohman Avenue
P.O. Box 1158
Hammond, Indiana
46325
Attorney for Respondents